

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**

UNITED STATES OF AMERICA,	)	
Complainant,	)	8 U.S.C. § 1324a Proceeding
	)	
v.	)	OCAHO Case No. 97A00148
	)	
WESTHEIMER WASH CORPORATION	)	Judge Robert L. Barton, Jr.
D/B/A BUBBLES CAR WASH,	)	
Respondent.	)	
	)	

**ORDER GRANTING IN PART COMPLAINANT'S  
MOTION TO AMEND THE COMPLAINT**

*(November 5, 1997)*

**I. BACKGROUND**

On October 23, 1997, Complainant moved to amend the Complaint in two significant respects. First, it seeks to amend Count II, which now only alleges that Respondent failed to prepare I-9 forms for the 206 listed individuals, to allege, as an alternative allegation, that Respondent failed to present the I-9 forms for inspection. In addition to asserting an alternative basis for the violation, Complainant seeks to increase the proposed civil money penalty for Counts II, III, IV, V, and the prayer for relief, because some of the employees referenced in the Complaint were unauthorized aliens.

Respondent opposes both amendments, contending as to the first that it contradicts the position the INS has maintained prior to and after filing of the instant complaint. Respondent asserts that the INS always has maintained that the I-9 forms for the 206 individuals listed in Count II never were provided by Respondent, a position that Respondent disputes as to 164 of the 206 individuals. Respondent also opposes the proposed increase in the penalties because some of the employees are alleged to have been unauthorized aliens. Respondent states that the amendment would increase its possible financial liability almost one year after the Notice of Intent to Fine (NIF) was served.

## II. APPLICABLE STANDARDS

The OCAHO Rules of Practice (OCAHO Rules) provide, in pertinent part, that the Judge may allow appropriate amendments to complaints any time prior to the issuance of the Judge's final order, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, if a determination of a controversy on the merits will be facilitated thereby. 28 C.F.R. § 68.9(e) (1996). Further, Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend shall be freely granted when justice so requires.<sup>1</sup> This is especially true in the early stages of the case. United States v. Mark Carter d/b/a Dixie Indus. Serv. Co., 6 OCAHO 865, at 3 (1996), 1996 WL 455009, at \*2<sup>2</sup> (Prehearing Conference Report and Order). Both the Federal Rules and the OCAHO Rules give discretion to the Judge to balance various considerations posed by the specific circumstances in each case and to impose conditions if necessary or appropriate, or to narrow the scope of an amendment if it considers the request too broad. See McCaffrey v. LSI Logic Corp., 6 OCAHO 867, at 3 (1996), 1996 WL 492319, at \*2. However, generally in the absence of factors such as undue delay, bad faith, dilatory motive, or undue prejudice to the opposing party, leave to amend should be freely given. Foman v. Davis, 371 U.S. 178, 182 (1962).

## III. FAILURE TO RETAIN AND PRESENT

Complainant seeks to amend Count II to assert, as an alternative to the allegation that Respondent did not prepare the I-9 forms, that it did not retain the I-9 forms and did not make such forms available for inspection by the INS during the scheduled inspection on February 5, 1996. Respondent's opposition to the amendment appears to misunderstand the Complainant's allegation. The INS asserts that it never was provided with the I-9 forms. The nexus of the INS' position is that Complainant did not prepare the I-9 forms prior to the inspection on February 5, 1996. However, even if Respondent can show that it did prepare the I-9 forms, Complainant asserts that they were not produced for inspection by the INS.<sup>3</sup> Moreover, Complainant continues to assert that it never

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<sup>1</sup> The OCAHO Rules provide that the Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by these rules. 28 C.F.R. § 68.1 (1996).

<sup>2</sup> If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

<sup>3</sup> If Respondent believes that the I-9 forms were prepared and/or presented to the INS, it may conduct discovery on that issue and present such evidence at trial.

has been provided with the I-9 forms for the 206 individuals listed in Count II.<sup>4</sup> Given that this case is in its early stages, I see no prejudice in allowing the amendment, and, thus, Complainant's motion to amend is granted with respect to this requested amendment.

### **III. UNAUTHORIZED ALIENS**

Complainant also seeks to amend Counts II, III, IV, and V to increase the penalties based on the allegation that Respondent hired unauthorized aliens. Respondent objects that the increased amount is greater than the fine sought in the NIF a year ago. Respondent does not address, and I do not decide, whether the INS may seek, either in the original complaint or an amended complaint, a civil money penalty greater than that requested in the NIF.

Complainant moves to amend the Complaint to seek a penalty increased by \$180 each with respect to thirteen paragraphs on the ground that the individual was an unauthorized alien. Specifically, Complainant moves to increase the penalty from \$350 to \$530 for the violations alleged in paragraphs A.5, A.13, and A.18 of Count II; from \$300 to \$480 for the violations alleged in paragraphs A.9, A.14, A.18, A.29, A.40, A.47, and A.69 of Count III; from \$300 to \$480 for the violation alleged in paragraph A.5 of Count IV; and from \$300 to \$480 for the violations alleged in paragraphs A.2 and A.6 of Count V. The increase would raise the penalty sought for Count II from \$72,100 to \$72,640; for Count III from \$24,000 to \$25,260; for Count IV from \$10,500 to 10,680; and for Count V from \$11,700 to \$12,060. The total penalty would increase from \$118,900 to \$121,240, an increase of \$2,340.

While the total increase in penalty is not large, amounting in aggregate to less than \$2,500, and not even two percent of the original total, nevertheless the proposed penalty of \$118,900 already is a substantial penalty, particularly for a company that asserts that it has annual sales of approximately \$3.6 million.<sup>5</sup> Moreover, the INS certainly should have known by the time it filed the Complaint whether these individuals were unauthorized aliens, since it had the information available to it during the investigation. Consequently, while I do not hold that the INS never may seek penalties in a complaint greater than that in a NIF, in this case I am reluctant to allow amendments to increase further the penalty sought in the Complaint. Although I deny Complainant's motion to increase the requested penalty, the hiring of unauthorized aliens remains one of the statutory factors in considering the amount of the civil money penalty. 8 U.S.C. § 1324a(e).

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<sup>4</sup> Indeed, in the First Prehearing Order issued on September 23, 1997, I ordered Complainant to file with the Court a copy of every I-9 form within its possession for the individuals referenced in the Complaint, including those for Count II. Complainant submitted I-9 forms for the other counts, but not for Count II. That constitutes a representation to the Court that the INS does not presently have in its possession the I-9 forms for the individuals listed in Count II.

<sup>5</sup> As stated by Respondent's president during the prehearing conference held October 23, 1997.

Complainant will be permitted to introduce evidence to show that the individuals in the paragraphs delineated above were unauthorized to work in the United States, as support for the penalty of \$118,900 sought in the Complaint.

#### **IV. CONCLUSION**

Complainant's motion to amend Count II of the Complaint to add paragraphs D and E, and to add the further paragraph asserting the failure to retain the I-9 forms, is granted. Complainant's motion to amend Counts II, III, IV, and V to seek an increased penalty is denied. Complainant is ordered to provide a complete copy of its amended Complaint to the Court and to Respondent.

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**ROBERT L. BARTON, JR.**  
**ADMINISTRATIVE LAW JUDGE**

## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 1997, I have served the foregoing Order Granting in Part Complainant's Motion to Amend the Complaint on the following persons at the addresses shown, by first class mail, unless otherwise noted:

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